

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

APOLLO DEWAYNE JOHNSON,

Defendant-Appellant.

UNPUBLISHED

May 19, 2011

No. 296706

Jackson Circuit Court

LC No. 08-005212-FC

Before: OWENS, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Defendant, Apollo DeWayne Johnson, was convicted following a jury trial of second-degree murder, MCL 750.317. He was sentenced as a fourth habitual offender, MCL 769.12, to 50 to 70 years in prison. Defendant appeals as of right. We affirm.

Defendant was charged with open murder in the death of Frank Smith. The killing took place on August 2, 2008, at the G. Robert Cotton Correctional Facility, where defendant and Smith were incarcerated. Defendant claimed that Smith attacked him with a shank, and that he inadvertently stabbed Smith with the shank while defending himself.

Defendant argues that he was denied effective assistance of counsel. We disagree. He did not raise the issue in a motion for a new trial or in a motion for an evidentiary hearing. Accordingly, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). The ultimate decision whether counsel rendered ineffective assistance is reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant argues that defense counsel was ineffective for neglecting to bring a pretrial motion in limine to preclude impeachment by references to defendant's prior armed robbery and carjacking convictions. Defense counsel objected at trial after the prosecutor asked defendant what he was in prison for, and defendant responded "armed robbery." In response to counsel's

objection, the trial court correctly stated that MRE 609 was the “relevant rule of impeachment,” and then held a bench conference. Afterwards, defendant admitted that he had been convicted of “car jacking,” indicating that the trial court ruled the evidence of his prior conviction admissible. Defendant offers no basis to support the proposition that the trial court would have ruled differently had defense counsel presented the prior conviction issue in a pretrial motion instead of at trial. Defendant has therefore failed to show either unreasonable performance by his counsel or a reasonable probability that the result of the trial would have been different.

Defendant argues that his trial counsel was ineffective for failing to investigate and secure Smith’s cellmate as a witness. Defendant’s counsel raised this issue on the fifth day of trial. According to counsel, defendant said Smith’s cellmate would testify that Smith possessed a weapon shortly before or on the date of the killing. Counsel acknowledged that calling the cellmate as a witness would be “unfair surprise to the People,” but nonetheless requested that he be permitted to call him as a witness. The trial court stated: “your client is now endeavoring to add the name of a surprise witness at trial. It’s untimely. Motion to amend the witness list is denied.”

There is no indication that Smith’s cellmate would have testified in accord with what defendant claimed at trial. There is no affidavit filed with defendant’s appeal, either from defendant or from the cellmate. As such, this Court is left with nothing more than defendant’s bald assertion to his attorney, which was made during the course of trial, that Smith’s cellmate had testimony favorable to his defense.

Assuming without deciding that Smith’s cellmate would have testified that Smith had a shank on the day of the killing, defendant fails to explain how his counsel would have known to interview the cellmate or include him on the witness list when counsel did not learn that the cellmate had relevant testimony until defendant informed him during trial. Counsel could not have been expected to interview each and every prisoner to determine if they were able to provide testimony to help the defense. Based on the record before this Court, defense counsel acted as soon as he reasonably could have in attempting to secure the testimony of Smith’s cellmate, given that defendant’s revelation regarding the testimony came during trial. Defendant has failed to show that he was denied his right to the effective assistance of counsel.

Defendant also argues that the prosecution failed to present sufficient evidence to enable a reasonable trier of fact to find that defendant did not act in self-defense. We disagree. When reviewing a sufficiency challenge, “evidence is reviewed de novo, in a light most favorable to the prosecution, to determine whether the evidence would justify a rational jury’s finding that the defendant was guilty beyond a reasonable doubt.” *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). The issue of credibility is for the jury to decide. This Court does not revisit credibility issues on appeal. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

“In Michigan, the killing of another person in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm.” *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990); see also MCL 780.972(1)(a) (providing that a

person may use deadly force against another if the person “honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual”). “Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt.” *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). [*People v Roper*, 286 Mich App 77, 86; 777 NW2d 483 (2009).]

Defendant’s evidence that he acted in self-defense came through his own testimony. Defendant claimed that Smith approached him with a shank, and that he believed Smith intended to kill him. Defendant said that Smith punched him in the face and pulled him out of his wheelchair. Defendant explained that he and Smith wrestled over the shank, and that somehow Smith “ended up getting stuck,” adding that “I didn’t even swing the knife,” it “was a lucky blow,” and that he did not know that Smith was stuck until they were lying on the floor. Despite this testimony, we find that the prosecution presented sufficient evidence to allow the jury to conclude beyond a reasonable doubt that defendant did not act in self-defense.

First, defendant’s credibility was greatly undermined by testimony indicating that he had made inconsistent statements about the incident. Detective Lisa Gee-Cram testified that defendant said he went to the shower to resolve his problems with Smith, but at trial defendant testified that he went there to take a shower. Notably, this claim was also undermined by the fact that the shower where the killing occurred, the “first base shower,” was not the shower that defendant was supposed to use. Defendant used a wheelchair, and the first base shower had a “lip” and was not handicap or wheelchair accessible, whereas the “third base shower,” the one closest to defendant’s cell, had a grab rail and no lip. Defendant also allegedly told Gee-Cram that Smith had the shank when he came out of the shower, but at trial defendant said that Smith got the shank from a laundry bag after he exited the shower. Second, testimony suggested that defendant further lied about the incident, claiming that he dropped the weapon that he used to commit the murder down the shower drain. Third, the jury may have believed that defendant’s injury, a swollen lip allegedly caused by a punch from Smith, was inconsistent with defendant’s testimony that Smith had a shank and intended to kill him with it. Had Smith intended such a result, defendant would likely have defensive wounds from attempting to grab the shank, not a swollen lip from a punch. Moreover, Smith was the one who had defensive wounds. Finally, defendant’s testimony that the killing was “inadvertent” is improbable. The sole, fatal wound was the piercing of Smith’s left lung and pulmonary artery. This was the sort of wound that an assailant acting with purpose and expertise might inflict. This Court will not interfere with the jury’s role of determining the weight of the evidence and credibility of witnesses. *Wolfe*, 440 Mich at 514-515.

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O’Connell
/s/ Patrick M. Meter